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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEVEN MATHEW BERRIGAN,

Defendant and Appellant.

F075520

(Super. Ct. No. CRF48882)

**OPINION**

APPEAL from a judgment of the Superior Court of Tuolumne County. James A. Boscoe, Judge.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Carlos A. Martinez and Kari Ricci Mueller, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

Defendant Steven Mathew Berrigan was convicted after a jury trial of first degree burglary of an occupied residence (Pen. Code, § 459;<sup>1</sup> count three) and simple assault (§ 240; count two).<sup>2</sup> In a bifurcated proceeding, Berrigan admitted five prior prison term enhancements (§ 667.5, subd. (b)). Berrigan was sentenced to the upper term of six years on count three and to consecutive terms of one year for each of the prior prison term enhancements. This included sentences on prior prison term enhancements of one year for a 1992 conviction and prison sentence for violating section 4532, subdivision (b) and a 1997 conviction and prison sentence for felony possession of methamphetamine pursuant to Health and Safety Code section 11377, subdivision (a). Berrigan was sentenced consecutively to two years for convictions on three counts in an unrelated criminal action. Berrigan's total prison sentence is 13 years.

On appeal, Berrigan contends there was insufficient evidence of his intent to commit a theft or other felony when he entered the victim's residence and, therefore, a crucial element of burglary is missing. Berrigan also contends the trial court erred in failing to strike his prior prison term enhancement for a felony drug conviction that is now treated as a misdemeanor. The parties agree the trial court had no discretion to decline striking the prior prison term enhancement. We sought additional briefing on the issue of whether an earlier prior prison term enhancement was subject to the washout rule once Berrigan's enhancement for the prior drug conviction was stricken.

We find there was sufficient evidence of Berrigan's intent to commit a theft or other felony when he entered the victim's residence. We further find the trial court erred

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<sup>1</sup> Unless otherwise designated, all statutory references are to the Penal Code.

<sup>2</sup> The jury acquitted Berrigan of the greater offense of assault with a deadly weapon originally charged in count two. The jury could not reach a verdict on count one, an allegation of residential robbery and this count was dismissed in the interests of justice.

in failing to strike Berrigan's prior prison term enhancement for an offense that is now to be treated as a misdemeanor and that the washout rule applies to the earlier 1992 felony conviction and prison term also applied as a prior prison term enhancement.

### **FACTS**

During late 2014 and early 2015, Larry Roberts was living in a tent trailer he had moved onto property owned by Richard B. (Richard) on French Flat Road in Tuolumne County. Roberts assisted Richard, whom Roberts described as suffering from Alzheimer's dementia. Richard did not "really have any friends." Because Richard had to be hospitalized for several weeks, Roberts stayed in Richard's home during late December 2014 to care for Richard's dog and to "watch the place."

One evening in December 2014, Roberts heard a knock on Richard's back door after dark around 9:00 or 10:00 p.m., possibly earlier. There was no porch light and the only light visible from the outside was the television. When Roberts opened the door, Berrigan and his girlfriend, Joanna Nelson, walked in without being invited to enter. Berrigan said he was there to see Richard but was told Richard was staying with his brother in Modesto and it might be a while before he came back. Berrigan and Nelson went outside,<sup>3</sup> but Berrigan returned about 10 minutes later, knocked on the door, and asked Roberts for a light. Roberts gave Berrigan a lighter and Berrigan left after lighting a cigarette.

One day in February 2015, Berrigan and Nelson returned to Richard's home for 30 to 45 minutes. Roberts recognized the two from December. Richard appeared to know Berrigan so Roberts left while they talked.

The next day, when Roberts left for work between 7:00 and 7:30 a.m., he noticed nothing unusual about Richard's home. When Roberts returned at 4:00 p.m., Richard

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<sup>3</sup> Roberts testified that he did not hear any indication that Berrigan and Nelson had actually left the property.

was watching television. Roberts noticed Richard's face was swollen and Richard said his teeth were bothering him. At first Roberts was not concerned with Richard's comment because Richard had problems with his teeth. A couple of hours later, Roberts noticed blood on a chair by the sliding glass door. Richard did not say that anything had happened. The following day, Richard told Roberts that Berrigan had come back to his home and Berrigan had blood on his arm.

Richard testified, explaining he remembered he was born in 1956. Richard recognized a picture of his home and knew he lived on French Flat Road. He also knew his daughter, Stacie B. (Stacie). Although Richard acknowledged he had problems with memory, he remembered Berrigan, knew Berrigan's nickname, identified him in court. Richard recalled Berrigan coming to his home a couple of times as well as a time Berrigan hurt him. Richard said Berrigan "got me pretty good" in the head, although he could not remember the details of the assault. Richard identified his own blood on a chair in his home from a photograph.

Stacie explained that her father had been beaten when she was a teenager and this incident negatively affected Richard's memory. Stacie was in charge of her father's finances and had his power of attorney. Roberts lived on her father's property and would call her if he noticed something worrisome about Richard. Roberts called Stacie when people came over to harass her father or if they broke into the property. Roberts called Stacie three or four times a month.

Although Richard usually did not have cash, Stacie had been with Richard when he won \$400 at the casino and she let him keep the winnings. This happened just before the incident with Berrigan. Richard placed the money in his wallet. Stacie took Richard directly home after he won the money.

The following day, Richard called Stacie around 2:00 or 3:00 p.m. Richard wanted her to come over because he was scared. Richard's face was huge and he had dried blood around his lips so Stacie took him to the hospital. At the hospital, Richard

told Stacie Berrigan was at his home and the next thing Richard knew he was on the ground bleeding everywhere. When Stacie asked Richard to show her his wallet, it was empty with no money. Richard did not remember why his wallet was empty. Richard told Stacie that Berrigan carried him to the bathroom.

Tuolumne Sheriff's Deputy Eric Worthington spoke to Stacie and Richard on February 16, 2015. Stacie was crying and very emotional. Worthington saw redness and swelling on the right side of Richard's face. Stacie had received a call from Roberts three days earlier, telling her that Berrigan and a woman were visiting Richard's home. When Worthington asked Stacie what her father had told her, she replied that Richard said Berrigan had been at the house. During a conversation, Berrigan blindsided Richard and the next thing Richard could remember was being on the ground, bleeding from the face. When Stacie asked Richard if he remembered Berrigan using a weapon, Richard said he only remembered seeing a wooden handle. Richard remembered being in the bathroom with Berrigan being cleaned up and seeing blood on Berrigan's arm. Richard told Stacie he was missing \$400 from his wallet which had been on his computer desk in his bedroom. The DNA from blood collected from Richard's recliner and threshold belonged to Richard.

Nelson explained that the second visit to Richard's home in February was to bring him a bottle of tequila. Nelson, however, told investigators she did not know how they would have paid for liquor because Berrigan had spent all of their money. Nelson went into the bathroom before Berrigan told her that Richard needed to use the bathroom.<sup>4</sup>

Nelson was questioned twice in person by Detective Robert Speers after the incident. Speers also talked to Nelson once by phone. The first time Speers questioned Nelson, she was defensive and denied anything happened. The second time she was

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<sup>4</sup> During examination, Nelson often answered questions stating that she did not remember events.

questioned, Nelson admitted she was present when Berrigan assaulted Richard. A redacted recording of the questioning session and transcript were provided to the jury. Nelson said she sat on the floor and watched television while Berrigan talked to Richard before Nelson got up to use the bathroom. While Berrigan was in the bathroom, Berrigan threw the door open and said, ““We’re leaving now.”” Richard walked into the bathroom with blood on his face. When Nelson asked Richard “what the hell happened” and if he needed help, Richard told her to leave. Berrigan took Richard into the bathroom to clean up and made Nelson leave. Nelson did not see what happened and did not see Berrigan use a weapon. Berrigan talked to Nelson after they left about a prior incident in which Richard had allegedly put his hands on Berrigan’s daughter. Berrigan was agitated when he talked to Nelson, but no more so than usual. Nelson noticed no obvious signs that Berrigan suddenly had money, although they would usually use Nelson’s money before Berrigan would spend his own.

#### **EVIDENCE OF BERRIGAN’S INTENT TO COMMIT BURGLARY**

Berrigan contends there was insufficient evidence that he had the intent to steal from Richard, or to commit another felony, when he entered Richard’s home. We disagree.

When a defendant challenges the sufficiency of the evidence, appellate courts must review the entire record in the light most favorable to the judgment to determine whether it discloses substantial evidence — evidence which is reasonable, credible, and of solid value — such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. This standard of appellate review is the same in cases in which the People primarily rely on circumstantial evidence. Although a jury must acquit if it finds the evidence susceptible of a reasonable interpretation favoring innocence, it is the jury, not the reviewing court, that weighs the evidence, resolves conflicting inferences, and determines whether the People have met the burden of establishing guilt beyond a reasonable doubt. If the trier of fact’s findings are reasonably justified under

the circumstances, the opinion of the reviewing court that the circumstances may also be reconciled with a contrary finding does not warrant reversal of the judgment. (*People v. Casares* (2016) 62 Cal.4th 808, 823-824.) After reviewing the evidence in the light most favorable to the prosecution, we determine whether any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212-1213.)

Unless the testimony of a single witness is physically impossible or inherently improbable, it is sufficient for a conviction. (Evid. Code, § 411; *People v. Young* (2005) 34 Cal.4th 1149, 1181.) An appellate court must accept logical inferences that the jury might have drawn from circumstantial evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396.) Before setting aside the judgment of the trial court for insufficiency of the evidence, it must clearly appear that there was no hypothesis whatever upon which there was substantial evidence to support the verdict. (*People v. Conners* (2008) 168 Cal.App.4th 443, 453; *People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573 (*Sanghera*).)

The elements of burglary include the act of unlawful entry accompanied by the specific intent to commit theft or a felony. One may be liable for burglary upon entry with the requisite intent regardless of whether the felony or theft actually committed is different from the one originally contemplated. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1041-1042; *In re Matthew A.* (2008) 165 Cal.App.4th 537, 540 (*Matthew A.*).) The defendant must intend to commit the theft or felony at the time of entry. The existence of the requisite intent, however, is rarely shown by direct proof but may be inferred from the facts and circumstances related to the offense. (*People v. Holt* (1997) 15 Cal.4th 619, 669; *Matthew A., supra*, 165 Cal.App.4th at p. 541.) Evidence of the theft of property following entry may create a reasonable inference that the intent to steal existed at the moment of entry. (*Matthew A., supra*, 165 Cal.App.4th at p. 541.)

The jury need not be unanimous as to what offense the defendant was intending to commit when he or she entered the premises. The jury must only agree the defendant intended to commit a theft or a felony at the time of entry. (*People v. Taylor* (2010) 48 Cal.4th 574, 627-628.) Where the facts and circumstances of a case and the conduct of the defendant reasonably indicate his or her purpose in entering the premises is to commit a theft or any felony, the conviction may not be disturbed on appeal. (*Sanghera, supra*, 139 Cal.App.4th at pp. 1574.)

There was evidence presented at trial that Berrigan either entered Richard's home to steal from him, or to assault him for touching Berrigan's daughter. Berrigan first visited Richard's home in December 2014. It was after dark, perhaps after 9:00 p.m. The home had no outside lights and was dark except for the television Roberts was watching. When Roberts answered Berrigan's knock on the door, Berrigan walked in without an invitation to do so. Roberts told Berrigan Richard was visiting his brother in Modesto and would not be back for a while. After Berrigan went outside, he did not immediately leave; instead, he waited about 10 minutes before returning and asking for a light for his cigarette. All of this behavior was suspicious and would support a reasonable inference that Berrigan was casing Richard's home.

When Berrigan returned in February 2015, he and Nelson talked to Richard. Roberts believed from the conversation that Richard and Berrigan knew each other and Roberts left soon after Berrigan arrived. Roberts and Stacie described Richard as suffering from dementia. The jury could reasonably infer that Richard's dementia would have been readily apparent to Berrigan during his first visit in February.<sup>5</sup> Berrigan returned the next day with Nelson while Roberts was away at work. While Nelson was in the restroom, Berrigan assaulted Richard who soon came into the bathroom bleeding from the face. Richard later discovered the \$400 he had recently won at a casino was

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<sup>5</sup> Richard's memory issues were evident in his trial testimony.



missing from his wallet, which had been in his bedroom on a computer table. Berrigan angrily complained to Nelson after they left Richard's residence that Richard had touched his daughter.

The loss of \$400 from a wallet in plain sight on top of a table, and the assault of an older person suffering from dementia because of a perceived slight toward Berrigan's daughter, support the inferences that Berrigan entered Richard's home either to steal from him or to assault him, or both. As noted, evidence of the theft of property following entry may create a reasonable inference that the intent to steal existed at the moment of entry. (*Matthew A.*, *supra*, 165 Cal.App.4th at p. 541.) There was substantial evidence from which the jury could reasonably infer that Berrigan entered Richard's home to commit theft and/or to feloniously assault him.

Berrigan argues there was little evidence of the history between himself and Richard. Berrigan describes the events in Richard's home as "sketchy" and argues the evidence that he wanted to bring Richard tequila shows there was no animosity between the two men. The fact that Richard knew Berrigan was well demonstrated by the nature of their conversation briefly overheard by Roberts. Further, Richard consistently referred to Berrigan by his distinctive nickname, even when identifying Berrigan at trial. The suggestion that Berrigan returned to Richard's home the second time in February to bring him tequila is also questionable because Nelson admitted to investigators that Berrigan had spent all of their money and there was none left to purchase liquor.

When reviewing the sufficiency of the evidence the relevant inquiry is whether, after reviewing the evidence in the light most favorable to the People, any rational trier of fact could have found the essential elements of the allegations true beyond a reasonable doubt. (*People v. Lindberg* (2008) 45 Cal.4th 1, 27.) Although Berrigan argues there are ways to interpret the facts in a manner different from the jury's verdict, it is not our task on appeal to reweigh the evidence or to reevaluate witness credibility. (*Ibid.*) We affirm the jury's verdict that Berrigan committed first degree burglary.

## **PRIOR PRISON TERM ENHANCEMENTS**

### ***Introduction***

Berrigan admitted five prior prison term enhancements after the jury rendered its verdict. Prior to sentencing, Berrigan filed a motion to reduce one of the five prison term enhancements to a misdemeanor because it was a violation of Health and Safety Code section 11377, subdivision (a), which once constituted a felony conviction but, after the enactment of Proposition 47, is now a misdemeanor. Berrigan further requested that the trial court strike the enhancement itself. The trial court denied Berrigan's motion.

After the parties submitted their briefing, the California Supreme Court issued its opinion in *People v. Buycks* (2018) 5 Cal.5th 857 (*Buycks*), holding that Proposition 47 turned former prior felonies that are now legally misdemeanors into misdemeanors for all purposes. Furthermore, this court has recently held that a former felony conviction that is now treated as a misdemeanor cannot be used as the basis for an earlier prior prison term enhancement where the washout provisions of section 667.5, subdivision (b) apply. (*People v. Warren* (2018) 24 Cal.App.5th 899 (*Warren*); *People v. Kelly* (2018) 28 Cal.App.5th 886 (*Kelly*)). We requested further briefing from the parties as to whether Berrigan's 1992 felony conviction for violating section 4532, subdivision (b) washed out because his 1997 conviction for violating Health and Safety Code section 11377, subdivision (a) is now a misdemeanor for all purposes.

The parties concur that the trial court erred in failing to grant Berrigan's motion to strike the 1997 prison term enhancement. The People, however, argue that the holdings in *Warren* and *Kelly* are incorrect because Berrigan still served a prison term beginning in 1997 and the washout provisions do not apply to him. We agree with the analysis in both of our recent cases and find that Berrigan's prison term enhancements in 1997 and 1992 must be stricken.

## ***Analysis***

Berrigan's felony conviction for possession of methamphetamine in 1997 was made a misdemeanor after the passage of Proposition 47 (§ 1170.18, subd. (a)). Subdivision (f) of section 1170.18 provides that a person who has completed his or her sentence for a felony conviction "who would have been guilty of a misdemeanor under this act had this act been in effect at the time of the offense" may file an application before the court that entered the conviction to have it designated as a misdemeanor. Subdivision (g) of section 1170.18 states that "[i]f the application satisfies the criteria in subdivision (f), the court shall designate the felony offense or offenses as a misdemeanor." Subdivision (k) of this statute states that a felony conviction that is recalled or designated "a misdemeanor under subdivision (g) shall be considered a misdemeanor for all purposes" except for the purpose of possessing a firearm. Exceptions to these provisions apply to those convicted of specified sexual offenses, but Berrigan is not subject to any exception. The trial court had no discretion under the statute to deny Berrigan's motion to strike his 1997 prison term enhancement for a violation of Health and Safety Code section 11377, subdivision (a), which is now a misdemeanor for all purposes. (*Buycks, supra*, 5 Cal.5th at p. 889.)

*Buycks* found the effects of Proposition 47 retroactive; a successful Proposition 47 petition "can reach back and reduce a defendant's previous felony conviction to a misdemeanor conviction." Once the conviction becomes a misdemeanor for all purposes, "it can no longer be said that the defendant 'was previously convicted of a felony,' " a necessary element for imposing a section 667.5, subdivision (b) enhancement. (*Buycks, supra*, 5 Cal.5th at p. 889.) Furthermore, *Buycks* disapproved *People v. Acosta* (2016) 247 Cal.App.4th 1072, to the extent it held that the misdemeanor for all purposes language of subdivision (k) of section 1170.18 alters only the status of felony convictions, not the fact the defendant has served a qualifying prior felony prison term for the purposes of a section 667.5, subdivision (b) enhancement. (*Buycks, supra*,

5 Cal.5th at p. 889, fn. 13.) The People's argument that Berrigan is still subject to an enhancement for his 1992 felony conviction because he served a subsequent prison term in 1992 was expressly rejected by *Buycks*.

Prior to the *Buycks* decision, this court held in *Warren* that earlier prior prison term enhancements that rested on a later felony conviction now deemed a misdemeanor for all purposes, were subject to the washout provisions of section 667.5, subdivision (b). (*Warren, supra*, 24 Cal.App.5th at pp. 914-917.) After *Buycks* was issued, our court again affirmed this principle in *Kelly, supra*, 28 Cal.App.5th at pp. 900-903. Berrigan's felony conviction in 1997 for violating Health and Safety Code section 11377, subdivision (a) is now a misdemeanor for all purposes. The trial court erred in denying Berrigan's application to deem this conviction a misdemeanor and to strike this enhancement. Furthermore, Berrigan has no other felony conviction between 1992 and 1997 that would overcome the washout rule. On remand, the trial court shall strike Berrigan's prior prison term enhancements for his convictions in 1997 and 1992.

### **DISPOSITION**

Berrigan's conviction and sentence for first degree burglary is affirmed. The trial court's true finding on three of Berrigan's prior prison term enhancements and the court's sentence thereon, as well as the court's sentence on the unrelated counts, are also affirmed. The case is remanded for the trial court to strike Berrigan's prior prison term enhancements for his convictions in 1997 for violating Health and Safety Code section 11377, subdivision (a), and in 1992 for violating section 4532, subdivision (b).

The court shall reduce Berrigan's sentence accordingly, prepare a new abstract of judgment reflecting these changes, and forward it to the proper authorities.

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SNAUFFER, J.

WE CONCUR:

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SMITH, Acting P.J.

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DE SANTOS, J.